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No. 92-1012

In The

Supreme Court of the United States

October Term, 1992

SIMPSON PAPER (VERMONT) COMPANY,

Petitioner,

v.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION and SIERRA CLUB,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Vermont

SUPPLEMENTAL BRIEF OF THE STATE OF VERMONT DEPARTMENT OF ENVIRONMENTAL CONSERVATION AND THE SIERRA CLUB IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

State of Vermont
JEFFREY L. AMESTOY
Attorney General

by: RONALD A. SHEMS
(Attorney of Record for Respondent VT DEC)
Assistant Attorney General
Pavilion Office Building
109 State Street
Montpelier, VT 05609-1001
(802) 828-3171

Sierra Club

by: HOWARD I. FOX, Esq.
(Attorney of Record for Respondent Sierra Club)
Sierra Club Legal Defense Fund
1531 P Street, N.W.
Suite 200
Washington, D.C. 20005
(202) 667-4500

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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Respondents State of Vermont Department of Environmental Conservation (DEC) and Sierra Club submit this supplemental brief pursuant to Rule 15.7 to draw the Court's attention to a recent decision by the Supreme Court of the State of Washington. In *State of Washington, Department of Ecology v. PUD No. 1*, 121 Wash.2d 179, Wash. Sup. Ct. No. S8272-6 (April 1, 1993), 1993 Wash. LEXIS 86, the court

upheld a minimum flow condition in a water quality certificate issued to a hydroelectric facility pursuant to § 401 of the Clean Water Act ("CWA"). As in the present case, the applicant had challenged the condition, alleging it was beyond the state's authority. The Court's reasoning directly supports the position taken by respondents in Points II, III and IV of their opposition brief (filed February 16, 1993).

1. In Point II respondents argued that, even if the issue presented by petitioner Simpson Paper Company were properly before the Court, certiorari should be denied because § 401(d) of the Clean Water Act authorizes states to condition certificates to ensure compliance with any "appropriate" requirement of State law. Because § 401(d) does not limit the states to consideration of *numerical* water quality standards, it was appropriate for DEC to attach a condition based on the non-numerical (or "designated use") portions of Vermont's water quality standards – specifically, those portions "requir[ing] that the Connecticut River be managed for 'water of a quality which consistently exhibits good aesthetic value . . . and recreation.' " Pet. App. 3a (quoting Vt. WQS § 3-03, reproduced in Petitioner's reply brief, app. 16a). *See also* CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A).

State of Washington directly supports the respondents' position:

> Tacoma argues that water quality standards are limited to pollution and discharges, as opposed to stream flow levels. It is true that the standards include provisions regarding pollution discharges. *See e.g.*, WAC 173-201-045(1)(c)(vii) (criteria for concentrations of toxic, radioactive, and deleterious materials in Class AA waters).

> However, as explained above, the standards' explicitly stated anti-degradation policy and classification of specific bodies of water in terms of characteristic uses, as well as the [water quality] standards' broad purpose, all demonstrate a broad concern for water quality, not just with pollution discharges. *See Bangor Hydro-Electric Co. v. Board of Envtl. Protection,* [595 A.2d 438 (Me. 1991)] (water quality standards would be a nullity if state could not consider designated uses).

121 Wash.2d at 188, 1993 Wash. LEXIS 86, *17-18. *See also* 121 Wash.2d at 192, 1993 Wash. LEXIS 86, *25.

Indeed, the court held that as long as a condition relates to water quality, it need not be based on a water quality *standard* at all:

> We conclude that the phrase "any other appropriate requirement of State law" in section 401(d) does not refer only to state water quality standards. We agree with the *Arnold* court[1] that the phrase is a congressional authorization to the states to consider all state action related to water quality in imposing conditions on section 401 certificates.

State of Washington, 121 Wash.2d at 191-92, 1993 Wash. LEXIS 86, *24. *A fortiori,* since the spillage condition imposed by the Vermont DEC not only related to water quality,[2] but was actually based on a specific state water quality *standard,* that condition passes muster under § 401(d).

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[1] *See Arnold Irrigation District v. Department of Environmental Quality,* 717 P.2d 1274 (Or. App. 1986).

[2] *See* Pet. App. 26a (Vermont § 401 certificate makes clear that aesthetics and recreation were invoked as they relate to "protection of downstream water quality").

2. *State of Washington* lends further support to Point III of the DEC and Sierra Club brief. The Washington Supreme Court joins the ranks of several other state courts of last resort that have addressed the scope of § 401 of the Clean Water Act. None has held that non-numerical water quality standards are unenforceable under § 401(d) of the Clean Water Act.

3. Finally, in Point IV, the DEC and Sierra Club responded to Simpson's claim that "Vermont's broad reading of § 401 as applied to hydroelectric projects amounts to a partial repeal of the [Federal Power Act] FPA by implication."[3] Pet. 26-27. *State of Washington* holds that a state may properly factor its designated uses into the setting of § 401(d) conditions, *see* pp. 2-3, *supra*, and further holds that such action by a state does not conflict with the FPA:[4]

> Considering first field preemption, there is neither an express nor an implied indication of any congressional intent to occupy the field so as to preclude states from exercising their authority and fulfilling their obligations under the Clean Water Act. When the FPA and the

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[3] The respondents maintain that this issue is not properly before the Court because Simpson did not raise it before any Vermont court. Joint Response 20-21. Moreover, there is nothing "impli[ed]" about § 401. Its terms and the requirements of the CWA are explicit. *Id.*

[4] In apparent recognition that the interplay between the CWA and the FPA does not raise preemption issues, Simpson limited its arguments to a claimed conflict between the FPA and the CWA. *State of Washington* addressed this issue in the context of a preemption claim, but its analysis of whether § 401 conflicts with the FPA is nonetheless dispositive.

Clean Water Act are considered together, the comprehensive scheme that emerges is one in which Congress left room for the states to supplement the FPA through the section 401 certification process. Enforcement of state laws is part of the federal scheme inasmuch as section 401 of the Act requires states to assure compliance with appropriate state laws. The comprehensive scheme consisting of both the Clean Water Act and the FPA presupposes rather than precludes the exercise of state authority. Consequently there is no basis for finding field preemption here.

As regards conflict preemption, there is no actual conflict between Ecology's action and the FPA. Compliance with Ecology's streamflow condition and the FPA is physically possible, and fulfillment of that condition does not stand as an obstacle to the accomplishment and execution of Congress's purposes. Indeed, exactly the same streamflow condition could have been required directly under the FPA, either by FERC directly or by FERC adopting recommendations regarding streamflow from Ecology during the licensing process. Moreover, finding conflict preemption under circumstances such as those presented here would have the effect of requiring Ecology to guess which elements of the 401 certificate might conflict with actions FERC might take at a later time, and then decline to condition the certificate based on this guess in violation of Ecology's mandate under the Act. We cannot believe Congress could have intended to create such an administrative nightmare.

State of Washington, 121 Wash.2d at 196-97, 1993 Wash. LEXIS 86, *34-35. In short, the requirements of the CWA are not implied, but explicit, and in any event are fully consistent with the FPA.

CONCLUSION

Even if this Court could ignore the adequate alternate ground raised in Point I of the respondents' brief,[5] *State of Washington* provides strong support for respondents' position that the challenged spillage condition was well

[5] In Point I, the respondents argued that certiorari is improper because the Vermont Supreme Court's judgment rests on an adequate alternate ground unchallenged by Simpson. The respondents continue to assert that this adequate alternate ground should prevent the Court from even reaching the arguments raised in Simpson's petition.

within the scope of Vermont's authority under § 401. Simpson's petition for a writ of certiorari should therefore be denied.

Dated: April 28, 1993

Respectfully submitted,

State of Vermont
JEFFREY L. AMESTOY
Attorney General

by: RONALD A. SHEMS
(Attorney of Record for
Respondent VT DEC)
Assistant Attorney General
Pavilion Office Building
109 State Street
Montpelier, VT 05609-1001
(802) 828-3171

Sierra Club

by: HOWARD I. FOX, Esq.
(Attorney of Record for
Respondent Sierra Club)
Sierra Club Legal Defense Fund
1531 P Street, N.W.
Suite 200
Washington, D.C. 20005
(202) 667-4500